

**THE FIRST JUDICIAL OF PENNSYLVANIA, PHILADELPHIA COUNTY  
IN THE COURT OF COMMON PLEAS**

**SARA JANE WEIBLE, Executrix  
of the Estate of WILLIAM WEIBLE,  
in her own right**

**VS.**

**BRAKE AND CLUTCH CO., et al**

**: Civil Trial Division  
:  
: July Term, 2005  
: No. 3073  
:  
:  
:  
: SUPERIOR CT. No. 2802 EDA 2007  
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**OPINION**

**Tereshko, J.**

**PROCEDURAL HISTORY**

Plaintiff, Sara Jane Weible, Executrix of the Estate of William Weible (“Plaintiff”), and in her Own Right, appeals this Court’s Order granting Summary Judgment to Defendants, Brake and Clutch Co. (“B&C”), McCord Corporation (“McCord”), Borg-Warner Corporation (“Borg-Warner”), and Carlisle Corporation (“Carlisle”) and dismissing with prejudice all claims against said Defendants. For the following reasons, this Court’s Orders should be affirmed.

**BACKGROUND**

Plaintiff commenced this Asbestos Mass Tort action alleging that William Weible (Decedent), developed mesothelioma and died as a result of his exposure to asbestos. *See* Plaintiff’s Brief in Opposition to Defendant B&C’s Motion for Summary Judgment filed on March 22, 2007, p. 1.<sup>1</sup> On May 22, 2007, Defendants, B&C, McCord, Borg-Warner,

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<sup>1</sup> For reasons unknown to this Court, Plaintiff’s Complaint was not found within the file.

and Carlisle individually moved for summary judgment asserting lack of sufficient product identification as required by *Eckenrod vs. GAF Corp.*, 544 A.2d 50 (Pa.Super. 1988) and its progeny. On June 8, 2007, Plaintiff filed responses to Defendants' motions. On July 10, 2007, after review of the motions and responses, this Court granted Defendants' motions and dismissed with prejudice all claims against Defendants. On July 19, 2007, Plaintiff filed a Notice of Appeal of the grant of summary judgment. On August 7, 2007, in response to this Court's order, Plaintiff filed a Statement of Matters Complained of on Appeal. The grounds upon which Plaintiff claims error are raised in her responses to the summary judgment motions. Specifically, Plaintiff claims she should have survived summary judgment because Decedent was exposed to asbestos fibers from Defendants' products with sufficient regularity, proximity, and frequency. *See* Plaintiff's Statement of Matters Complained of on Appeal, August 7, 2007.

### **DISCUSSION**

Plaintiff argues that the record in this case establishes genuine issues of material fact as to Decedent's exposure to asbestos fibers from Defendants' products and that this Court erred in granting summary judgment. However, the record fails to establish that Decedent inhaled asbestos fibers from products manufactured by Defendants.

"In determining whether to grant a motion for summary judgment, the trial court must view the record in the light most favorable to the non-moving party and resolve any doubts as to the existence of a genuine issue of material fact against the moving party." *Gilbert v. Monsey Prods. Co.*, 861 A.2d 275, 276 (Pa. Super. 2004). In reviewing a grant of summary judgment, an appellate court's scope of review is plenary and will reverse only upon finding that the trial court abused its discretion or erred as a matter of law.

*Harahan v. AC & S, Inc.*, 816 A.2d 296 (Pa. Super. 2003).

“Failure of a non-moving party to adduce sufficient evidence on an issue essential to its case and on which it bears the burden of proof such that a jury could return a verdict in its favor establishes the entitlement of the moving party to judgment as a matter of law.” *Young v. DOT*, 744 A.2d 1276, 1277 (Pa. 2000). Yet, evidence presented must be of such weight so that this Court need not speculate in order to find for the Plaintiff.

*Juliano v. Johns-Manville Corp.*, 611 A.2d 238, 239 (Pa. Super. 1992). Plaintiff will not survive summary judgment if, “... a jury cannot find, except by speculation, that it was a defendant’s product which caused the plaintiff’s injury.” *Id.* at 239.

Our Superior Court, in *Eckenrod vs. GAF Corp.*, 544 A.2d 50 (Pa. Super. 1988), set forth the elements necessary to prove a *prima facie* case of asbestos liability:

In order for liability to attach in a products liability action, plaintiff must establish that the injuries were caused by a product of the particular manufacturer or supplier. Additionally, in order for a plaintiff to defeat a motion for summary judgment, a plaintiff must present evidence to show that he inhaled asbestos fibers shed by the specific manufacturer’s product. Therefore, a plaintiff must establish more than the presence of asbestos in the workplace; he must prove that he worked in the vicinity of the product’s use. Summary judgment is proper when the plaintiff has failed to establish that the defendants’ products were the cause of the plaintiff’s injury.

*Id.* at 52.

Finally, when weighing the evidence for summary judgment, our Superior Court requires this Court to only consider evidence that is properly introduced. “Answers to such inappropriate leading questions [by plaintiff’s counsel] are not admissible and may not serve as the basis for surviving a summary judgment motion.” *Wilson v. A.P. Green Industries, Inc.*, 807 A.2d 922, 926 (Pa. Super. 2002).

From 1958 to 1991 Decedent worked as a residential boiler installer for PECO. *See*, Deposition of William Weible on September 14, 2005, pp. 26-37. Decedent's alleged exposure to asbestos fibers occurred during the period he worked at PECO. *Id.* at 27. Ironically, Plaintiff alleges Decedent's exposure to asbestos dust occurred not while performing his occupational duties, but while visiting automotive mechanics, Paul Baylor ("Baylor") and David DeMarco ("DeMarco"), at the PECO garage in Morton, Pennsylvania. *See* Deposition of David DeMarco on February 21, 2007, p. 12. Because Decedent's assigned workplace was not the PECO garage, he was not familiar with the products and projects that occurred within the garage. Thus, Decedent's testimony does not establish the product identification required by *Eckenrod*. Instead, Plaintiff uses DeMarco and Baylor, both mechanics who worked in the PECO garage, as product identification witnesses.

Decedent claims that he visited the PECO garage at Morton "everyday" as he walked through the garage on his way to his car at the end of his workday. *See* Deposition of William Weible on February 9, 2007, pp. 22-24. The testimony does not clarify the number of years Decedent visited "everyday". Baylor testified that Decedent only began visiting the garage at some, unidentified, point after 1964 (the year Baylor started at the PECO garage). *See* Deposition of Paul Baylor on February 6, 2007, pp. 39-40. Baylor testified that the Decedent's visits only started after Decedent began working as a "turn-on man". *Id.* at 40. The Court is given no further information on the start date or end date of Decedent's visits.

Decedent testified that the length of Decedent's visits to the garage varied in duration. On some occasions, Decedent apparently only passed through the garage.

Q: ...how long would you stay [in the garage]?

A: Oh, I don't know. It depended on the time of day. I had clocked out at 5:00 and if I got back into the garage about 4:30, then, you know, I would stand in there for a half hour before I clocked out. Or, you know, if it was five minutes to five, I would just, you know, say, 'hi guys, how you doing,' and keep going.

*See* Deposition of William Weible on February 9, 2007, p. 24 Ins. 4-13.

When Baylor was asked if the length of Decedent's visits to the garage lasted longer than twenty minutes, he replied, "I couldn't truthfully say that." *See* Deposition of Paul Baylor on February 6, 2007, p. 40 ln 8. Also, Baylor said Decedent's visits "quite frequently" lasted less than fifteen minutes. *Id.* at 40.

Plaintiff did not present sufficient evidence of asbestos exposure that may have occurred while the Decedent walked through the garage. Neither Baylor nor DeMarco specifically state what they were doing when Decedent visited. Instead, they give vague references to the type of work undertaken in the garage and the amount of time it took them to finish a job. Baylor and DeMarco's testimony never establishes that mechanics were actually working when Decedent was present. The most concrete evidence offered by the Plaintiff only suggests that the Decedent passed through the garage at the start of the night shift. Therefore, lacking any evidence except a vague timeframe, the Court would need to speculate as to DeMarco's and Baylor's actions while Decedent walked through the garage. Under *Juiliano*, the Court cannot indulge Plaintiff's speculation.

As explained below, delineated for each Defendant, neither Baylor nor DeMarco testified to asbestos exposure with the regularity, frequency, and proximity required by *Eckenrod*.

In addition, Plaintiff only supplies ambiguous testimony regarding the time period

Decedent walked through the garage. In short, Decedent's testimony lacked certainty and specificity. Stopping by a garage for a few minutes a day for an indeterminate period does not rise to the level of regular, frequent, or proximate exposure required under *Eckenrod*. Moreover, interpreting the testimony would require speculation as to the regularity of Decedent's visits. It is clear under *Juiliano* that the Court cannot speculate in order to allow Plaintiff to survive summary judgment.

Furthermore, Decedent never testified that any of the moving Defendants' products were used when he visited the garage. Also, Decedent never testified that Defendants' products contained asbestos. As will be later discussed, Plaintiff attempted to elicit further product identification testimony from Baylor and DeMarco. However, this Court did not consider such testimony because it was improperly elicited through leading questioning.

Plaintiff alleges Decedent had regular, frequent and proximate contact with asbestos over ambiguous periods of time during which asbestos exposure was not established. Also, Plaintiff failed to present sufficient product identification evidence linking Decedent to asbestos products made by Defendants. Thus, regular, proximate, and frequent exposure to asbestos fibers was not established.

Plaintiff alleges Decedent was exposed to asbestos dust originating from Defendant Borg-Warner's clutches. However, Plaintiff failed to establish that Decedent worked in the vicinity of Defendant's products with sufficient regularity, proximity and frequency.

Plaintiff must be given the benefit of the doubt regarding issues of material fact. *See Gilbert*, supra. However, DeMarco's and Baylor's testimony was elicited with improper leading questions and requires inferences not supported by case law. Thus,

neither DeMarco nor Baylor introduced competent evidence that Decedent came into contact with Defendant's products with sufficient regularity, proximity and frequency as defined by *Eckenrod*. See *Eckenrod*, supra.

While responding to leading questions about a Borg-Warner clutch, Baylor admitted that he could not remember any instance where he installed or handled a Borg-Warner product while Decedent was in the garage.

Q: Was Mr. Weible around when you were working on Borg-Warner clutches?"

COUNSEL: Objection

A: That I can't, I can't attest to.

See Deposition of Paul Baylor on February 6, 2007 p. 48 ln. 25 – p. 49 lns.1-4.

In another equally insufficient attempt to connect Borg-Warner to Decedent, Plaintiff relies on leading questions that cannot be accepted as evidence. See *Wilson*, supra. In addition, Plaintiff failed to present any specific occasion where Decedent was in the garage with a Borg-Warner clutch that created dust. DeMarco could not even estimate how often Borg-Warner clutches were used in the garage

Q: Was the clutch or were the clutches that Borg-Warner sold asbestos containing?

A: Yes.

Q: Did you work with them on a regular and frequent basis while a mechanic at PECO?

COUNSEL: Objection.

A: Yes.

Q: When you used the Borg-Warner asbestos containing clutch was dust created?

A: Yes.

COUNSEL: Objection.

See Deposition of David DeMarco on February 21, 2007, p. 59 lns. 6-18.

Such leading questions were objected to in a timely manner and their answers cannot be considered by the court. See *Wilson* at 926. Therefore, DeMarco's and Baylor's testimony regarding Borg-Warner will not serve to link Defendant to this case.

In addition, Plaintiff did not present evidence that Defendant's clutches created asbestos dust. DeMarco testified as to the packaging of Borg-Warner products, but, unlike his specific testimony as to the presence of asbestos dust in other products, he did not state that Borg-Warner packaging was the source of asbestos dust. *See* Deposition of David DeMarco on February 21, 2007, p. 58.

The Plaintiff argues that since Borg-Warner products were in the garage while Decedent was in the garage, the jury could infer he was exposed to the asbestos dust. However, Plaintiff's only evidence regarding Borg-Warner products in the workplace was elicited through improper, inadmissible, leading testimony. Thus, the jury cannot reach the conclusion that Defendant's products were in the workplace. Moreover, the case law is clear that the Plaintiff can only survive summary judgment if she provides evidence suggesting more than mere presence in the workplace. *See Eckenrod, supra.*

Plaintiff alleges Decedent was exposed to asbestos dust originating from Defendant B&C's brakes and clutches. However, Plaintiff failed to establish that Decedent worked in the vicinity of Defendant's products with any degree of regularity, proximity and frequency.

The testimony of Baylor, to Plaintiff's attorney, explains that Defendant's products were only used at a garage not visited by Decedent.

A: I know, I thought it over. I think when I worked out of 23<sup>rd</sup> Street that's the company we dealt with, 23<sup>rd</sup> and Market, that was our main garage at the time.

Q: All right, well, that's going to solve a lot of my questions about that. I won't have to ask that because, as I understand it, Mr. Weible was never at the 23<sup>rd</sup> Street Garage?

A: No.

Q: Okay, so just to be clear then, Brake and Clutch Company of Philadelphia, in your mind, you associate that with 23<sup>rd</sup> Street?

A: Yes.

*See* Deposition of Paul Baylor on February 21, 2007, p. 189 lns. 1-15.

It seems rather obvious that Decedent could not come into contact with dust, possibly existing, at a location, never visited. Plaintiff failed to meet even the slightest vestige of the *Eckenrod* test. *See Eckenrod*, supra.

The only evidence Plaintiff proffered was acquired through inadmissible, leading testimony taken from Mr. DeMarco.

Q: Now, I want to ask you a general question, and this pertains to both the asbestos containing brakes and the asbestos containing clutches that were sold by Brake and Clutch Company of Philadelphia. Without worrying about a specific date, do you have a clear recollection that Mr. Weible would have been in the garage, on multiple occasions, when you were working with Brake & Clutch Company of Philadelphia asbestos products?

COUNSEL: Objection.

A: Yes.

Q: Would he have been exposed to the same asbestos dust, that you were, from those products?

A: Yes.

Q: And did he breathe that dust?

A: Yes.

*See* Deposition of David DeMarco on February 21, 2007, p. 48 lns. 3-23.

Such leading questions were objected to in a timely manner and cannot be considered by the Court. DeMarco's naming of the Defendant through leading questioning will not serve to link Defendant to this case. *See Wilson*, supra.

Lastly, Plaintiff failed to provide sufficient evidence that Baylor or DeMarco worked on brakes while Decedent was in the garage.

Q: How many brake changes, excuse me, how long would each brake change take or would that depend on the size of the vehicle?

A: Well, it would depend on that and it would depend on how good you were at changing them, you know.

*See* Deposition of David DeMarco on February 21, 2007 pp. 22-25 – p. 23 lns. 1-4.

DeMarco's testimony does not specify that Decedent was present while the brakes were changed. Also, because the time period was ambiguous, the Court cannot find regularity without engaging in speculation. Under *Juiliano*, the Court will find for Defendant if the Plaintiff's evidence requires speculation for satisfaction of the *Eckenrod* test.

Plaintiff unequivocally failed to meet the frequency, regularity, and proximity required by *Eckenrod*.

Plaintiff alleges that Decedent's exposure to asbestos dust originated from Defendant Carlisle's brake pads and clutches. However, Plaintiff failed to establish that Decedent worked in the vicinity of any of Defendant's allegedly asbestos-containing products.

Neither DeMarco nor Baylor linked Defendant's products to asbestos. DeMarco only connected Defendant's brake pads to asbestos through a string of leading questions.

Q: Were the Carlisle brakes asbestos brakes?

A: Yes.

COUNSEL: Objection.

Q: Did you have to sand those brakes when you installed them?

COUNSEL: Objection.

A: Yes.

Q: Did the Carlisle brakes create dust when you worked on them?

COUNSEL: Objection.

A: Yes.

*See* Deposition of David DeMarco on February 21, 2007, p. 49 Ins. 23-25 – p. 50 Ins. 1-13.

The leading questions were objected to in a timely manner and cannot be considered by the Court. DeMarco's naming of the Defendant through leading questioning will not serve to link Defendant to this case. *See Wilson, supra*.

Defendant's witness supplied testimony that Carlisle never sold brakes to PECO. *See* Deposition of Ronald Creamer in Plaintiff's Motion for Summary Judgment Exhibit C at p. 1. Also, Carlisle contends it never made the type of brakes described by DeMarco. *See* Defendant Carlisle's Motion for Summary Judgment on May 22, 2007 at p. 4.

Additionally, Plaintiff tried to use speculative testimony to tie Decedent's alleged asbestos exposure to Defendant's products. However, DeMarco could not affirm that Decedent watched while Defendant's brakes were installed.

Q: So with respect to a Carlisle brake, you can't tell me of any particular occasion where you actually removed a Carlisle brake from a vehicle, correct?

A: I can't tell you that, no.

A: No. If the supply house sent it to us we would Q: Are you able to give me any idea how often you would have actually installed a Carlisle brake? install it.

Q: ...is what you're telling me, simply that you installed Carlisle brakes and Bill was around, so therefore he had to have been around?

A: Yes, that's what I'm telling you.

Q: That's your assumption, correct?

A: Yes.

*See* Deposition of David DeMarco on February 21, 2007, p. 118 lns. 14-23, p. 120 lns. 10-16

A close inspection of this testimony reveals that DeMarco admits, not that he knew he was installing Defendant's brakes in the presence of Decedent, but that he assumed he was installing Defendant's brakes. Also, as noted above in the B&C discussion, Plaintiff never established that brake changes took place on a regular basis. Simply, speculation will not serve to link Defendant to this case, nor will it allow Plaintiff to survive summary judgment. *See Juiliano, supra.*

Plaintiff alleges Decedent was exposed to asbestos dust originating from

Defendant McCord's gaskets. However, Plaintiff failed to establish that Decedent was exposed to Defendant's products with any degree of regularity, frequency, or proximity. The product identification evidence presented by Plaintiff is entirely speculative. Consequently, she cannot survive summary judgment.

Plaintiff relies on comments from Baylor's testimony that were purely speculative.

BY MR. LEONARD -

Q: Do you have a specific recollection of Mr. Weible ever being present when you were using a McCord product?

A: Not a specific, but if I was working with it and he came in, he was breathing the same air I was.

Q: Objection, move to strike as speculation.

Q: And I understand you know what you worked with and you know that Mr. Weible was in the garage on occasion. But my question to you is, do you know, whether on any of those occasions, you were actually using a McCord product when he was there?

A: Not specifically.

*See* Deposition of Paul Baylor on February 21, 2007, p. 157 lns. 15-22 (emphasis added).

Such comments do not add weight to Plaintiff's argument because Baylor only adds conditions to already speculative statements. His testimony cannot be used to satisfy the *Eckenrod* test because it is made up of speculation and thusly requires the Court to speculate as to its weight and meaning. The Court will not participate in such speculation, so Plaintiff will not survive summary judgment.

*See Juliano*, supra.

Plaintiff ignores the dilemma presented by Baylor's testimony by going forward with an argument that attempts to fulfill the entire *Eckenrod* test with one statement. Plaintiff appears to believe that Baylor's deposition lends itself to the obvious conclusion,

“Mr. Weible was exposed to a McCord product just a certainly as Mr. Baylor himself had been.” *See* Plaintiff’s Reply to the Motion for Summary Judgment on June 8, 2007 at p. 3. However, this case does not concern Baylor’s exposure. Quite the contrary, this case involves a different person, Mr. Weible, who was limited in his window of exposure by the simple fact that he did not work in the garage. The Court considered Plaintiff’s argument as applied to the regularity, frequency and proximity required by *Eckenrod* and found it lacking. A close look at the combination of Baylor’s testimony and DeMarco’s testimony reveals that the evidence, on which Plaintiff relies, is speculative on its face and insufficient even when pieced together to create an illusion of sufficient exposure.

Baylor, speaking entirely with qualifiers, stated, “So, if I was removing the gasket, and he was there, he would be subjected to the same air I was breathing.” *See* Deposition of Paul Baylor on February 21, 2007, p. 155, Ins. 18-20 (emphasis supplied). For such a comment to reach a jury the witness would need to placate the speculative nature by definitively stating that Decedent and the product’s dust were at the same location at the same time. Baylor did not do this. So, he did not succeed in placing Decedent at the site while he changed a gasket.

Even the addition of DeMarco’s testimony to Baylor’s does not supply the regularity, proximity, and frequency required by *Eckenrod*. DeMarco did not recall seeing “McCord” on any of the products nor could he specifically remember removing a McCord gasket.

A: .. I don’t recall ever seeing Victor stamped on a gasket or McCord stamped on a gasket. I don’t recall that.

Q: Okay, so you would have no way of knowing whether Mr. Weible was around when you were removing a gasket manufactured by Victor or McCord specifically, correct?

A: That's correct.  
*See* Deposition of David DeMarco on February 21, 2007, p. 108 Ins. 16-20.

When questioned about how frequently the gaskets were changed, DeMarco responded, "Not on a daily basis, no." *Id.* at p. 100 Ins. 5-8. Because Decedent only passed through the worksite briefly, for an indeterminate period of time, and unidentified gaskets were removed on an infrequent basis, the evidence presented does not satisfy frequency, regularity and proximity of *Eckenrod*.

Plaintiff's witnesses only assumed McCord gaskets were used and contained asbestos. DeMarco assumed the gaskets were McCord products because of an assumption he created upon seeing the word "McCord" on a board full of hooks that was used to hold the gaskets. *See* Deposition of David DeMarco on February 21, 2007, p. 105. DeMarco made no mention of asbestos in these "hook" gaskets. Baylor then built on DeMarco's guess by assuming the gaskets contained asbestos because the products needed to be placed in a hot area. *See* Deposition of Paul Baylor on February 21, 2007, p. 153 Ins. 22-35 – p. 154 ln. 1. Such assumptions are speculative and cannot be used to support the conclusion that dust from McCord products were frequently, regularly, or proximately in contact with the Plaintiff. *See Juiliano*, supra.

In summation, Plaintiff cannot survive summary judgment because she presented, at best, mere speculation masquerading as circumstantial evidence. "Whether a plaintiff could successfully get to the jury or defeat a motion for summary judgment by showing circumstantial evidence depends upon the frequency of the use of the product and the regularity of plaintiff's employment in proximity thereto." *See Eckenrod* at 53.

Plaintiff should remember that the Court cannot, without proper foundation, simply construct a patchwork of inferences about what occurred during the periods of

time when Decedent was at the worksite. It is Plaintiff's duty to present evidence that builds a case, without leading questions or speculation, allowing a rational jury to recreate what happened while Decedent was at the location where the asbestos dust allegedly spewed from Defendant's product.

**CONCLUSION**

For the foregoing reasons this Court's Orders granting Summary Judgment in favor of Defendants, Brake and Clutch Co. ("B&C"), McCord Corporation ("McCord"), Borg-Warner Corporation ("Borg-Warner"), and Carlisle Corporation ("Carlisle"), should be AFFIRMED.

**BY THE COURT:**

**3-18-2008**

**Date**

**ALLAN L. TERESHKO, J.**